Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Lycon, Inc.,

Petitioner

v.

EVI Oil Tools, Inc. and
Michael S. Juenke,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Robinson-Patman Act prohibits sellers from discriminating in price between different purchasers when the discrimination substantially lessens, injures, destroys, or prevents competition. EVI Oil Tools, Inc. manufactures and sells artificial-gas-lift equipment to Lycon, an independent distributor, at discriminatorily higher prices than EVI sells the same equipment to retail purchasers. EVI's pricing scheme has destroyed competition between EVI, Lycon and other distributors for sales to retail customers. Does EVI's pricing scheme illicitly affect competition and violate the Act?

PARTIES TO THE PROCEEDINGS

Petitioner

Lycon, Inc.

Respondents

EVI Oil Tools, Inc. and Michael S. Juenke, individually and in his capacity as a corporate officer of EVI Oil Tools, Inc.

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Lycon, Inc. respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 250 F.3d 285 (5th Cir. 2001), and is reproduced in App. A at 1a–8a. The judgment and memorandum ruling of the United States District Court for the Western District of Louisiana, Lafayette/Opelousas Division, are unreported and are reproduced in App. B at 9a–20a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on April 27, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

As a secondary method of oil recovery, artificial gas lift involves the injection of pressurized gas into an oil well to assist the natural flow of oil to the surface. Lycon is a distributor of gas-lift equipment, which consists primarily of mandrels, valves, and latches manufactured by EVI. Lycon also competes with EVI for retail sales of gas-lift equipment to oil-producing and operating companies.

Lycon commenced distribution of EVI gas-lift equipment in 1996. In October 1997, EVI began to circumvent Lycon and its other independent distributors by selling directly to retail end users, including Lycon's customers, through its wholly-owned retail outlets. Since then, EVI has competed directly with Lycon in the retail market for sales to end users.

This case arises from EVI's practice of selling gas-lift equipment to end-user purchasers at prices substantially and discriminatorily lower than the prices it charges Lycon. EVI does not sell to Lycon at prices equivalent to those it provides the favored purchasers. Because of EVI's disparate pricing scheme and its detrimental effect on Lycon's ability to compete, Lycon sued EVI for violating § 2(a) of the Robinson-Patman Act[1] amendments to the Clayton Act and also set forth several state law claims.

The district court entered summary judgment dismissing Lycon's price-discrimination claim, holding that Lycon could not prove that it directly competed with the favored purchasers at the same functional level of competition. The court believed such proof is an element of

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[1] 15 U.S.C. § 13(a).

Lycon's burden, and concluded that Lycon could not prove that EVI's discriminatory sales illicitly affected competition.

Lycon appealed, asserting that the district court erred in requiring proof of direct competition with favored purchasers and in failing to recognize that, because EVI's pricing disparity substantially and detrimentally affected competition between EVI, Lycon, and other distributors for sales to end users, it was prohibited by § 2 (a). The court of appeals affirmed, holding that Lycon has no claim under § 2(a) because it is not in competition with the favored end users.

A. Relevant Facts

On April 15, 1996, EVI purchased the assets of Production Specialties, Inc. ("PSI") of Lafayette, Louisiana, a gas-lift-equipment manufacturer. EVI's purchase of PSI marked its initial entry into the gas-lift-equipment manufacturing and sales market.

From July 1, 1994 until April 1996, Lycon's principals, Ron Massicot and R. Greg Maxwell, sold gas-lift equipment to retail end users for PSI as commission salesmen. Massicot and Maxwell were PSI's only sales force. They were very experienced in the gas-lift-equipment market, in which the vendor, through its sales force, must supply the customer with technical knowledge and judgment for design, installation, supervision and service, particularized for each application. In other words, the accompanying service component is separate from but essential to the sale of the equipment.

Although EVI had no prior experience in the gas-lift-equipment market and had no salesmen in the market, it excluded from the PSI asset purchase the Sales Marketing

Agreement by which PSI had obtained Massicot's and Maxwell's services. The day after EVI purchased PSI's assets, Massicot and Maxwell met EVI's President and Chief Financial Officer. Since EVI had no other sales force, its officers emphasized the importance of maintaining a relationship with Massicot and Maxwell. They explained that maintaining existing customers was critically important to EVI, and offered them the opportunity to operate as an EVI-authorized distributor to the retail market. They told Massicot and Maxwell that EVI would sell its gas-lift equipment to end users only through independent wholesale distributors.[2]

Lycon was activated by Massicot and Maxwell to become an EVI distributor. Beginning in April 1996, Lycon purchased new gas-lift equipment at wholesale directly from EVI, marketed the equipment with its design and installation capability, and resold the equipment to its retail customers. Through Lycon's efforts, EVI maintained substantially all sales previously enjoyed by PSI.

In October 1997, despite its prior contrary assurances, EVI began selling equipment directly to Lycon's retail customers in direct competition with Lycon.[3] Effective April 1998, EVI amended its distributor price list, raising substantially gas-lift equipment wholesale prices to Lycon and other distributors.[4] At substantially the same time, EVI's parent corporation merged with Weatherford Enterra, Inc., which owned several gas-lift-equipment manufacturers as

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[2] Exhibit "C" to Plaintiff's Opposition to Summary Judgment, Excerpt of Deposition of Maxwell; Exhibit "D" to Plaintiff's Opposition to Summary Judgment, Excerpt of Deposition of Stiles.

[3] Exhibit "I" to Plaintiff's Opposition to Summary Judgment, Declaration of Jack Brink.

[4] *Id.*

subsidiaries. Through this merger, EVI became one of only two remaining gas-lift-mandrel manufacturers in the world.[5] Knowing it was now Lycon's only viable source of new gas-lift equipment at wholesale prices, EVI substantially reduced retail prices charged to end users, resulting in retail prices substantially lower than wholesale prices. By engaging in this pricing scheme after establishing market control, EVI assured its ability to successfully undercut Lycon in the retail-sales marketplace and eliminate Lycon and other distributors as competitors for retail sales. Designed to drive its own distributors and newly-targeted competitors from the market, this pricing scheme also violated § 2(a) by tending to create a monopoly in the gas-lift-equipment line of commerce.

EVI raised wholesale prices twice again, effective October 1998 and October 1999, obtaining an even greater advantage in retail pricing. These tactics also put Lycon at a competitive disadvantage with its own customers in the market for design and installation services and new equipment. By consistently selling gas-lift equipment to Lycon at prices substantially *higher* than EVI's retail prices for sales directly to Lycon's customers and other retail customers, EVI forced Lycon to abandon the new-equipment market. EVI's sales records show that it made numerous sales to retail purchasers at substantially lower retail prices than the "wholesale" prices it charged Lycon.[6] Comparatively, EVI's invoices of sales to Lycon show prices substantially higher than the prices paid by other EVI purchasers.[7] For example, EVI sold a gas-lift mandrel *with*

[5] *Id.*

[6] Exhibit "H" to Plaintiff's Opposition to Summary Judgment, Comparative EVI Invoices.

[7] *Id.*; Exhibit "F" to Plaintiff's Opposition to Summary Judgment, Declaration of Greg Maxwell.

expensive coating to Chevron for $755 and sold the same mandrel *without* coating to Lycon for $1,010. EVI never made any lower, "retail" price it charged end users available to Lycon. This pricing scheme, in which EVI abandoned the wholesale level completely and inverted the traditional wholesale-retail pricing structure could have only one purpose: to illicitly eliminate EVI's competition for retail sales from distributors such as Lycon.

EVI's price discrimination causes injury to competition by eliminating competitors in the gas-lift-equipment line of commerce and violating § 2(a). EVI admits its retail prices to end users are substantially lower than its wholesale prices to Lycon and other distributors, but maintains that § 2(a) does not prohibit such an inverted, discriminatory pricing scheme. EVI contends that unfavorable price differentials to wholesale purchasers that compete with EVI are not actionable when the favored purchaser is an end user.

All that competition with EVI requires is a level playing field in equipment pricing. If EVI complied with § 2(a) by selling Lycon gas-lift equipment at the same, nondiscriminatory price at which it sells to end-user purchasers, Lycon could compete with EVI for retail-equipment sales by more efficiently providing the design, installation, maintenance and repair services necessary to the original equipment sale. Without an equivalent price in compliance with § 2(a), Lycon and other distributors are completely prevented from competing with EVI for retail sales to end users, and competition, for all intents and purposes, has been destroyed.

B. The Proceedings Below.

In the district court, EVI requested summary judgment on Lycon's § 2(a) price-discrimination claim, maintaining EVI's sales to retail customers are not actionable because there is no sale to a favored purchaser at Lycon's functional level of competition. The central issue was whether discriminatory, higher-priced sales to Lycon were actionable because of the effect on competition between Lycon and EVI at the retail-sales level, or legitimate, merely because the competing but lower-priced sales were to retail end-user customers.

The district court granted EVI summary judgment.[8] The court erroneously determined that Lycon had not presented — and could not present — proof that the "price discrimination had a prohibited effect on competition on either a direct or indirect level of functional equality."[9] It reasoned that the complained-of sales were not actionable because they were not made to a favored purchaser at Lycon's competitive level or affected competition between parties at the same level.[10]

Relying on the Fifth Circuit's decision in *Eximco, Inc. v. Trane*[11], because EVI's favored retail end users were not Lycon's competition, the district court concluded that Lycon could not prove that EVI's discriminatory higher-prices to Lycon had a prohibited effect on competition. The district court did not address the affect on competition between EVI and Lycon at the "same level of competition" for retail sales.

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8 District Court Judgment, App. B at 10a.

9 Memorandum Ruling, App. B at 18a.

10 *Id.*, App. B at 18a–19a.

11 737 F.2d 505 (5th Cir. 1984).

On appeal, the Fifth Circuit recognized that *Eximco* was not directly controlling because, unlike Lycon in the present case, Eximco did not challenge as discriminatory the sale from Trane (through its agent) to the end user, and the *Eximco* court did not decide whether that sale violated § 2(a). The court stated that the fourth *Texaco, Inc. v. Hasbrouck*[12] element — whether the price discrimination has a prohibited effect on competition — controlled its decision. Moreover, the court recognized that, in *Hasbrouck*, this Court held that anticompetitive effects can result from price discrimination between distributors and retailers who buy from the same manufacturer/seller. However, the court held that Lycon has no claim under § 2(a) because it is not in competition with the end users that receive more favorable prices. In doing so, the appeals court failed to address the undisputed competition between EVI and Lycon for sales to end users and the detrimental effect of EVI's discriminatory pricing scheme on that competition.

The question presented is whether EVI's pricing scheme, which purposefully prevents Lycon and other distributors from obtaining equivalent prices provided by EVI to their common purchasers, illicitly affects competition in violation of § 2(a). Lycon submits that EVI's pricing violates § 2(a), which plainly requires EVI to sell to Lycon at the same price it sells to *all* other purchasers. At this summary judgment stage, the court of appeals erred in affirming the district court's dismissal of Lycon's § 2(a) claim.

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[12] 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed 2d 492 (1990).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' decision conflicts with the clear language of the Robinson-Patman Act, this Court's decision in *Texaco v. Hasbrouck*, and prior Supreme Court precedent.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, *to discriminate in price between different purchasers* of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, *where such commodities are sold for use, consumption, or resale* within the United States . . . and *where the effect of such discrimination may be substantially to lessen competition* or tend to create a monopoly in any line of commerce, or *to injure, destroy, or prevent competition with any person* who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . (Emphasis added.)

Price discrimination is "merely a price difference."[13] To establish a violation of § 2(a), Lycon must prove that:

(1) EVI's sales to Lycon or comparable purchasers were made in interstate commerce;

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[13] *Id.*, 496 U.S. at 558, 110 S.Ct. at 2544.

(2) products sold to Lycon were of the same grade and quality as sold to the other purchasers;

(3) EVI discriminated between Lycon and other purchasers in price; and,

(4) EVI's discrimination had a prohibited effect on competition.[14]

Lycon presented sufficient proof on all four *Hasbrouck* elements. Lycon established that EVI:

- increased "wholesale" prices charged Lycon on three separate occasions;[15]
- made sales to Lycon based on those prices;[16]
- made comparable sales of identical equipment to other purchasers at substantially lower prices;[17]
- virtually eliminated competition for sales in the retail gas-lift line of commerce.

Injury to competition is inferred from evidence that some purchasers had to pay their supplier substantially more

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[14] *Id.*, 496 U.S. at 556, 110 S.Ct. at 2542-43.

[15] Exhibit "E" to Plaintiff's Opposition to Summary Judgment, Wholesale Price Lists effective Fall of 1996, April 1, 1998, October 21, 1998, and October 8, 1999; Exhibit "F" to Plaintiff's Opposition to Summary Judgment, Declaration of Greg Maxwell; Exhibit "G" to Plaintiff's Opposition to Summary Judgment, Declaration of Ron Massicot.

[16] Exhibit "H" (subexhibits one, two and three) to Plaintiff's Opposition to Summary Judgment, EVI Comparative Invoices.

[17] *Id.*

for their commodities than the favored purchasers paid.[18] Nevertheless, the appeals court held that Lycon could not prove that EVI's obvious price discriminations had a substantial effect on competition because EVI favored only retail purchasers who were themselves not in direct competition with Lycon. Relying on incidental dicta in *Security Tire & Rubber Co. v. Gates Rubber Co.*[19], the court of appeals held that Lycon could not prove a § 2(a) violation because it was "not in competition with the allegedly advantaged end users,"[20] and that § 2(a) protects competition only among competing purchasers. The court failed to recognize that there is no textual support or authority, even in *Security Tire*, for such a restriction of § 2(a). The court also did not appreciate that EVI's pricing scheme placed Lycon and other distributors at a severe competitive disadvantage in the preexisting competition with EVI and created a virtual monopoly in the domestic gas-lift-equipment line of commerce. The court of appeals explicitly preferred its two-decades-old dicta in *Security Tire* to the statutory text and this Court's more recent decisions such as *Hasbrouck*.

In the cases decided under § 2(a), this Court has consistently and properly looked to the statutory text. An analysis of § 2(a)'s text, based upon established Supreme Court precedent, and application of the text to the facts of this case, mandates reversal of the court of appeal's ruling.

Under *Hasbrouck*, price discriminations that favor purchasers at one so-called functional level of competition and disfavor purchasers at another functional level are actionable. The *Hasbrouck* decision, therefore, concluded

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[18] *Id.*, 496 U.S. at 559, 110 S.Ct. at 2544, citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47, 68 S.Ct. 822, 92 L.Ed 1196 (1948).

[19] 598 F.2d 962 (5th Cir. 1979).

[20] *Lycon v. Juenke*, 250 F.3d at 289, App. A at 8a.

that the functional level analysis is irrelevant; the crucial inquiry is whether the price discrimination illicitly affects competition, regardless of the functional level of the favored purchaser relative to the disfavored purchaser. This Court principally relied on the language of § 2(a), which is worded very broadly to encompass price discrimination in sales "where such commodities are sold for *use, consumption, or resale* within the United States . . ."[21] This language does not require the two sales to be made to entities at the same functional level of competition or the two sales to be made to entities in competition that will then resell the commodities. Congress' use of the disjunctive "or" plainly means that the scope of the statute includes *any* purchasers, whether retail, wholesale or otherwise, who purchase for use, consumption, *or* resale. EVI's sales to Lycon of gas-lift equipment are for "resale." EVI's sales of gas-lift equipment to retail end users are for "use" and "consumption" in the oil-production process. Both sales therefore meet the requirements of § 2(a).

The words "competing buyers" or "competing purchasers" cannot be found in § 2(a) or in *Hasbrouck's* enunciation of the burden of proof. The statutory language makes unlawful a discrimination "in price between different purchasers of commodities," not strictly between different purchasers that directly compete with one another for resale. Congress' use of only the word "purchasers" — not "competing purchasers" — includes *any* purchasers from a single seller.

In *Hasbrouck*, independent gasoline retailers sued Texaco, claiming that its sales to gasoline wholesalers at lower prices constituted price discrimination. The claimants alleged that Texaco encouraged the favored wholesalers to

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[21] 15 U.S.C. 13(a).

open their own retail gasoline station in competition with the independent retailers.

In defense, Texaco asserted that, because the favored sales took place at the wholesale level between Texaco and the distributors and the disfavored sales were from Texaco to the independent retailers at a different functional level, the independent retailers could not challenge the favored sales as discriminatory. Like EVI here, Texaco argued that the discrimination was not actionable because the favored sales were not made to purchasers at the same functional level of competition as the independent-retailer plaintiffs. This Court specifically rejected Texaco's defense that all price differentials, except those given to purchasers competing at the same functional level, are exempt from § 2(a), reasoning that the defense is foreclosed by the clear statutory language:

> In the context of a statute that plainly reveals *a concern with competitive consequences at different levels of distribution*, and carefully defines specific affirmative defenses, it would be anomalous to assume that Congress intended the term 'discriminate' to have such a limited meaning.[22]

Hasbrouck held that the substantial lessening of competition between the favored wholesale distributors' customers and the independent retailers violated § 2(a). This Court focused on whether the price discrimination caused injury to competition regardless of whether the favored purchaser was a direct competitor at the same functional level as the disfavored purchaser. Thus, the Court found Texaco violated § 2(a) by favoring wholesalers and causing injury to competition between retailers, i.e., at a different functional and competitive level than that of the favored purchaser.

[22] *Hasbrouck*, 496 U.S. at 557, 110 S.Ct. at 2543. (Emphasis added.)

Hasbrouck is no revolution. The appeals court's decision deviates from forty years of consistent and explicit interpretation of § 2(a) by this Court, beginning with *FTC v. Anheuser-Busch*.[23] In that case, defendant Anheuser-Busch argued that § 2(a) was not intended to protect its competitors but only to protect its purchasers that competed against one another from being charged different prices. This Court soundly rejected this argument and established that § 2(a) protects not only "competing buyers" but also competitors of the seller. The Court reasoned:

> Since . . . *an independent and important goal of § 2(a) is to extend protection to competitors of the discriminating seller, the limitation of that protection by the alien factor of competition among purchasers would constitute a debilitating graft upon the statute.*
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> * * * *
>
> In other words, the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, 'discriminate in price.' Not only would such action be contrary to what we conceive to be the meaning of the statute, but, perhaps because of this, it would be thoroughly undesirable. As one commentator has succinctly put it, 'Inevitably every legal controversy over any price difference would shift from the detailed

[23] 363 U.S. 536, 80 S.Ct. 1267, 4 L.Ed.2d 1385 (1960).

> governing provisions 'injury,' cost justification, 'meeting competition,' etc. over into the 'discrimination' concept for ad hoc resolution divorced from specifically pertinent statutory text.' Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1, 38.[24]

Accordingly, "In the *Anheuser-Busch* case, the Court rejected the seller's claim that an actionable discrimination could only arise if the favored and disfavored purchasers were in competition with one another[.]"[25] Indeed, the court of appeal's decision is presciently described in Professor Rowe's observation adopted by this Court as "wrongfully devolved from the detailed statutory governing provisions . . . into the 'discrimination' concept for ad hoc resolution divorced from specifically pertinent statutory text."

The court of appeal's decision makes § 2(a) redundant of § 2(d). This interpretation of § 2(a) was repudiated by this Court in *FTC v. Fred Meyer*.[26] The FTC charged that the defendant violated § 2(d) by inducing price discrimination. This Court distinguished the narrow § 2(d) language from the broad § 2(a) language, to-wit:

> "The competition with which Congress was concerned in § 2(d) was that between buyers who competed in resales of the supplied products . . . Congress' objective [in § 2(d)] was to assure that all sellers, regardless of

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[24] *Id.*, 363 U.S. at 546, 549-50, 80 S.Ct. at 1273-75. (Emphasis added; footnotes omitted.)

[25] 3 CARLA A. HILLS, ANTITRUST ADVISER, § 4.05, p. 254 (1985).

[26] 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968).

> size, competing directly for the same customers would receive evenhanded treatment from their suppliers . . . *[W]hen Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2(a) of the Act* by prohibiting price discrimination which may 'injure, prevent, or destroy competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.'"[27]

The clear and unmistakable language of § 2(a), quoted on point in *Anheuser-Busch* (1960), *Fred Meyer* (1968), and *Hasbrouck* (1990), provides that § 2(a) is not limited solely to "resellers operating on the same functional level."[28] The statutory language, consistently applied by this Court for 30 years, is now contradicted by the court of appeals' decision. This Court's jurisprudence makes clear that a claim under § 2(a) encompasses alleged price discrimination which may injure competition with ***any*** person (here, between Lycon and EVI) who grants *or* receives the benefit of such discrimination.

EVI is both Lycon's supplier and its primary competitor for retail sales of gas-lift equipment. EVI has integrated the gas-lift-equipment line of commerce so that there is, in reality, only one functional level of competition. Section 2(a) protects competition between EVI, Lycon, and other distributors for retail sales to end users. EVI's

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[27] *Id.*, 390 U.S. at 356-57, 88 S.Ct. at 912 (Emphasis added; citations omitted; footnote omitted.)

[28] *Id.*

maintenance of higher prices to Lycon for the same gas-lift equipment EVI sells at lower prices to retail purchasers has caused direct competitive injury to Lycon. The fact that EVI's price discrimination also harms, rather than favors, other purchasers in competition with Lycon only compounds, rather than alleviates, EVI's violation of the statute.

Unlike the various appellate courts which have added words to § 2(a) that Congress did not promulgate, shifting elements of defense to the claimant's burden, this Court has consistently held that the language of § 2(a) is to be applied and construed as written without the "debilitating graft" of unwritten and unlegislated requirements or "alien factors" such as "competing buyers" at the same "functional level" of competition.[29] EVI engages in price discrimination by selling the same commodities to Lycon and other distributors at prices substantially higher than prices charged to other, different purchasers. EVI patently refuses to make prices equivalent to its retail prices available to Lycon. This price discrimination substantially lessens, injures, and destroys competition between Lycon and EVI, the "person" who *both* grants, and knowingly receives, the benefit of its price discrimination against Lycon.

EVI would clearly violate § 2(a) by selling equipment at a discriminatory price to a third-party purchaser in competition with Lycon to benefit the third-party purchaser. This case presents a more egregious § 2(a) violation because EVI sells equipment at discriminatory prices to third-party purchasers not in competition with Lycon, benefiting EVI, which itself is in competition with Lycon. In both scenarios, EVI violates § 2(a); competition is substantially lessened in the former case, and virtually eliminated in this case.

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[29] *FTC v. Anheuser-Busch*, 363 U.S. at 546, 549-50, 80 S.Ct. at 1273-75.

Under the court of appeals' decision, price discrimination is only actionable when EVI impairs one purchaser's ability to compete with another EVI purchaser, but not when EVI destroys the customer's ability to compete with EVI. According to this view, the more injurious EVI's pricing scheme to its customer/competitor, the less actionable. By that logic, EVI's discrimination is protected as long as it benefits EVI alone. The court's interpretation of § 2(a) gives EVI a safe harbor for its discriminatory scheme, but is counterintuitive to the economic reality that EVI engages in price discrimination against its distributors who are now its direct competitors. This is the precise evil that § 2(a) prohibits: "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination."[30] The effect on competition is obvious, palpable, and actionable.

B. The Court of Appeals' decision conflicts with the First Circuit's decision in *Caribe BMW, Inc. v. BMW AG.*

The impact of the *Hasbrouck* holding has been appreciated and recognized in other circuits, most notably the First Circuit Court of Appeals in the *Caribe* case.[31] In *Caribe*, the First Circuit examined a situation similar to *Hasbrouck*. Caribe BMW, a Puerto Rican automobile retailer, purchased automobiles directly from BMW AG in Germany. Caribe alleged that BMW AG sold cars to BMW

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[30] 15 USCA § 13(a).

[31] *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW AG")*, 19 F.3d 745 (1st Cir. 1993).

North America ("BMW NA"), its wholly-owned subsidiary, which resold the cars to retailers other than Caribe at prices lower or terms more favorable than those at which BMW AG, the parent corporation, sold to Caribe.

The court held that BMW AG's ownership of BMW NA made BMW AG and BMW NA a "single seller,"[32] and recognized that such ownership alone eliminated the possibility of a sale, as required under § 2(a), between the parent and its wholly-owned subsidiary. By the same token, however, this single-seller status also made the subsidiary's lower priced sale to its purchaser attributable to the parent and, in turn, affected competition between the parent (through the subsidiary) its purchasers, and the plaintiff. Justice Breyer, then writing for the appellate court, explained that when a wholly-owned subsidiary resells the commodity to a third-party purchaser, it must do so at a nondiscriminatory price, a price that would be permissible under § 2(a) had the subsidiary's sale to the purchaser been made by the parent corporation. The Court employed the following practical explanation: if BMW AG, the parent, sells to Caribe, the independent retailer, at 14, then BMW NA, the subsidiary, cannot sell to third-party purchasers for less than 14. If it does, it will be found to have violated the Act, assuming all conditions of the Act are met and no defenses apply.[33] In accordance with *Hasbrouck,* the court held that the disfavored sale level need not be the same as the favored sale level, as long as the discrimination substantially lessened competition at any level.

Applying *Caribe's* reasoning to this case, if EVI sells gas-lift mandrels to Lycon at $1,010 each, then EVI's retail

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[32] *Id.*, at 751.

[33] *Id.*

outlet cannot sell to third-party purchasers for less than $1,010, without regard to their "functional level of competition" *vis-a-vis* Lycon. Or conversely, if EVI sells mandrels to Chevron at $755, then EVI cannot sell to Lycon or any other purchaser for more than $755, assuming all other conditions of § 2(a) are met and no defenses apply.

The conflict between *Caribe* and this case is most obvious in the application of the holding in the Fifth Circuit's *Security Tire* decision. In *Caribe*, the First Circuit correctly applied the *Security Tire* holding that a transfer from a parent to a wholly-owned subsidiary is not a "sale" for Robinson-Patman Act purposes. The Fifth Circuit's revisionist view, however, reconstrued *Security Tire* to have held "that the Robinson-Patman Act targets anti-competitive price discrimination [only] among competing buyers."[34] Were that the actual holding of *Security Tire*, the First Circuit in *Caribe* could not have extracted the "single seller" rule to make the parent liable for the subsidiary's sale causing injury at a different level.

As *Hasbrouck* and *Caribe* realized, the "level" of the "favored purchaser" was never relevant to the elements of a § 2(a) claim. The appeals court in this case did not appreciate that the statute required a sale of goods by the wholly-owned subsidiary to a third-party purchaser be made at a nondiscriminatory price, one that would be permissible under the § 2(a) had the subsidiary's sale to the purchaser been made by the parent corporation. *Hasbrouck* and *Caribe* recognized that a claim under § 2(a) is specifically *not* conditioned on the level of the injury or the purchaser, but based solely upon discriminatory sales that cause injury to competition, even to parties in different distribution chains.

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[34] *Lycon v. Juenke*, 250 F.3d at 290; App. A at 8a. (Bracketed insertion added.)

As *Hasbrouck* and *Caribe* have now explicitly confirmed, § 2(a) only requires discriminatory sales by a common seller and *injury to competition*. While this *may* occur at the level of the favored purchaser, it is not necessary. It may also occur at the disfavored purchaser's level. It is logically necessary *only* that the favored and disfavored sales be made by the same defendant through different competitor distribution systems. And while it may be a defense under § 2(d) that the purchasers operate at different functional levels, this quite purposefully is not even a defense, much less an element of a claim, under § 2(a).

The *Caribe* analysis represents a return to straightforward reading of § 2(a) dictated by this Court's precedent in *Hasbrouck*, *Fred Meyer*, and *Anheuser-Busch*. The court of appeals' decision in this case stands in stark contrast to the literal and analytical approach taken by the *Caribe* decision. The court of appeals' attempt to distinguish *Caribe* factually, because the discriminatory sales in *Caribe* affected competition between downstream retailers in separate distribution chains, simply begs the question. EVI's discriminatory sales cause the same retail-level competitive injury to Lycon and other distributors in competition with EVI as Texaco caused in *Hasbrouck* and BMW AG caused in *Caribe*.

Lycon recognizes that certain lower court decisions hold that a distributor cannot maintain an action against a manufacturer for price discrimination under § 2(a). For example, in *Conoco v. Inman Oil*[35], the court held the plaintiff/distributor, Inman, could not successfully compete with Conoco for downstream sales because even an

[35] 774 F.2d 895 (8th Cir. 1985).

equivalent price would preclude a profit to Inman. The court assumed that, "[a]s a matter of economics, [Inman] would have had to charge more for the gasoline than it paid defendant in order to cover expenses and make a profit."[36] Based on this assumption, it concluded that Inman could not successfully compete with Conoco, and, therefore, Inman was not harmed by Conoco's reduction in prices charged to their common purchasers.

Unlike Inman, *vis-a-vis* Conoco, Lycon is in competition with EVI for retail sales to their common end-user purchasers. In this line of commerce, Lycon could compete with EVI without having to charge more than it paid EVI for equipment by more efficiently providing the essential design, installation, maintenance and supervision services. Lycon could not only survive but also make a reasonably healthy profit by passing along the gas-lift equipment to the purchaser at or near its cost and making its profit on the service component.

Therefore, the *Inman* holding, which was based upon the Eighth Circuit's assumptions about the gasoline market in which the market dynamics are substantially different, is not applicable to this case. The same assumption simply cannot be made to determine this case. Lycon does not contend that § 2(a) requires EVI to support its profit margin by selling to Lycon at prices less than the more favorable prices EVI charges retail end users. Lycon only wants what the law requires, a price equivalent to that which EVI sells gas-lift equipment to retail end users. If Lycon were to receive an equivalent price that complies with § 2(a), it could compete with EVI for retail sales to end users.

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[36] *Id.*, at 903.

EVI discriminates against Lycon by setting Lycon's price higher than the price charged favored retail purchasers. This is patent price discrimination, which has disabled Lycon's ability to compete with EVI for retail sales. Under *Hasbrouck*, because the price discrimination is substantial, injury should be "inferred."[37] The fact that EVI discriminates at the wholesale level does not insulate it from liability for injury to competition at the retail level that favors EVI itself.

CONCLUSION

For the foregoing reasons, petitioner Lycon, Inc. respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted:

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[37] *Hasbrouck*, 496 U.S. at 559, 110 S.Ct. at 2544.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
APRIL 27, 2001
CHARLES R. FULBRUGE III, CLERK

No. 00-30595

LYCON, INC,

Plaintiff-Appellant

VERSUS

MICHAEL S. JUENKE, individually and as corporate officer of EVI Oil Tools Inc.; EVI OIL TOOLS, INC.,

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Louisiana

Before STEWART and PARKER, Circuit Judges, and GOLDBERG, Judge.*
ROBERT M. PARKER, Circuit Judge:

* Judge of the United States Court of International Trade, sitting by designation.

Plaintiff Lycon, Inc. appeals the summary judgment entered in favor of Defendants EVI Oil Tools, Inc. and Michael S. Juenke (collectively "EVI") in this price discrimination action. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

Lycon sued EVI, alleging that EVI had violated federal antitrust laws by engaging in price discrimination in violation of 15 U.S.C. § 13, as well as asserting claims under Louisiana law for price discrimination, unfair trade practices, unfair sales, trade secrets violations, tortious interference, and breach of implied contract. EVI moved for summary judgment.

Viewing the summary judgment evidence in the light most favorable to Lycon, the non-movant, the record reveals the following facts. In April 1996, EVI purchased the assets of Production Specialties, Inc. ("PSI") of Lafayette, Louisiana, which manufactured gas lift equipment for use in oil production. EVI's purchase of PSI was its initial entry into the gas lift equipment market. From July 1, 1994 until the acquisition of PSI by EVI, Ron Massicot and R. Greg Maxwell worked as commissioned salesmen for PSI in Southwest Louisiana. Shortly after the purchase of PSI, Massicot and Maxwell met with EVI representatives who explained that EVI intended to sell its gas lift equipment to end users through independent wholesale distributors. EVI offered Massicot and Maxwell the opportunity to operate as such distributors to the retail market. Massicot and Maxwell accepted the offer. They reactivated Lycon, a dormant corporation owned by Massicot, hired former PSI employees, opened an office, secured warehouse facilities, obtained the necessary insurance and began selling EVI gas lift equipment to retail clients such as oil production and operating

companies.

In October 1997, EVI began making direct sales to retail customers. In the Spring of 1998, EVI merged with Weatherford Enterra, Inc., another corporation with subsidiaries in the gas lift equipment manufacturing business, becoming one of two remaining manufacturers of gas lift mandrels in the world. Effective April 1998, EVI amended its wholesale price list, raising wholesale prices of gas lift equipment and reducing retail prices, resulting in retail prices substantially lower than wholesale prices. Wholesale prices were raised again in October 1999. At this point, wholesale distributors, including Lycon, were paying more for EVI's gas lift equipment than end users who bought the equipment directly from EVI.

The district court granted summary judgment for EVI, reasoning that "Lycon cannot prove that EVI's alleged price discrimination had a prohibited effect on competition...." Having disposed of the only claim that provided a basis for federal question jurisdiction, the district court dismissed Lycon's remaining state law claims without prejudice pursuant to 28 U.S.C. § 1367(3).

DISCUSSION

A. Standard of Review

Summary judgment is reviewed de novo, applying the same standard on appeal that is applied by the district court. *See, e.g., Reliance Nat'l Ins. Co. v. Estate of Tomlinson, 171 F.3d 1033, 1035 (5th Cir.1999).* Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See*

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Prohibited Effect on Competition

Lycon contends that the district court erred in holding that it could not prove that the difference between EVI's wholesale and retail pricing of gas lift equipment had a prohibited effect on competition, either directly or indirectly. This claim requires interpretation of section 2(a) of the Clayton Act, as amended in 1936 by the Robinson-Patman Act, 15 U.S.C. § 13(a), which provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them ...

According to the Supreme Court, establishing a violation of § 13(a), requires Lycon to prove four facts: (1) sales made in interstate commerce; (2) the commodities sold to Lycon were of the same grade and quality as those sold to other purchasers; (3) that EVI discriminated in price between

Lycon and other purchasers; and (4) that the discrimination had a prohibited effect on competition. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990). The parties do not dispute that Lycon submitted evidence sufficient to survive summary judgment on the first three factors. The fourth factor — whether the discrimination had the prohibited effect on competition — is the focus of the district court's summary judgment analysis and of this appeal.

The district court reasoned that the price discriminations between end users and wholesale distributors, including Lycon, favored only retail purchasers that were not in competition with Lycon and that such price discrimination was not actionable, relying principally upon *Eximco, Inc. v. Trane Co.*, 737 F.2d 505 (5th Cir.1984). In Eximco, a wholesale distributor (Eximco), which took title to air conditioning and heating equipment from the manufacturer (Trane), challenged as discriminatory the alleged "sale" by Trane of similar products to Shepherd, an agent of Trane. *Id.* at 508-509. In competition with Eximco, Shepherd arranged retail sales to customers; Trane shipped the equipment and passed title directly to the customer. *Id.*, Relying on *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir.1979), which established the rule that "transfers from a parent corporation to its wholly owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit," id. at 965, we found that Shepherd functioned as a subsidiary of Trane. *Eximco*, 737 F.2d at 516. It follows, we held, that Trane and Shepherd were acting as a "single unit," and thus, no predicate "sale" was made between Trane and Shepherd. *Id.*

While acknowledging that *Eximco* is factually similar to the present case, Lycon argues that the district court erred

in applying its ruling here because Lycon challenges the sale of gas lift equipment from EVI directly to Lycon's retail customers, rather than a transfer between EVI and its own subsidiary. Lycon is correct that Eximco did not challenge the sale by Trane to the retail customer as discriminatory, and thus *Eximco's* ruling is not directly controlling.

Nevertheless, we are compelled to follow Eximco's reasoning, which explained that injury under § 13(a) "will be one of two basic types: primary line or secondary line." *Eximco*, 737 F.2d at 515. Primary-line injury, which occurs at the level of direct competition, customarily results when a seller uses predatory pricing policies to enhance his market position over competitors, while secondary line injury customarily results when a large purchaser uses its vast purchasing power to obtain low prices from the manufacturers or distributors whose products it stocks, thereby enabling it to undersell competitors. *Id.*

Lycon argues that EVI's price structure caused injury to Lycon in a "dual-role context" as a purchaser from EVI and as a competitor against EVI in the retail market. Because Lycon is both EVI's competitor and customer, it suffered both primary and secondary line injuries. Lycon also argues, somewhat inconsistently, that the primary/secondary dichotomy is a useless abstraction in this situation.

Because the record discloses no injury to Lycon that § 13(a) contemplated protecting against, we will affirm the district court. Lycon does not compete with EVI in manufacturing gas lift equipment and *Eximco* forecloses any cause of action based on EVI's transfers to its wholly owned retail outlet. *Id.* at 516 (holding that a transfer of inventory from a manufacturer to a wholly owned subsidiary corporation was not a "purchase" for purposes of § 13(a)).

2. Continued vitality of Eximco

Lycon next contends that, even if *Eximco* forecloses its cause of action, the Supreme Court's 1990 analysis in *Hasbrouck* undermines or limits the Fifth Circuit interpretation of § 13(a) set out in *Eximco.* In *Hasbrouck,* independent Texaco retailers, who bought gasoline directly from Texaco, sued Texaco claiming that the sale of gasoline at lower prices to wholesale distributors, who in turn sold to retailers who competed with the plaintiffs, constituted price discrimination in violation of the Robinson-Patman Act. *Hasbrouck*, 496 U.S. at 547, 110 S.Ct. 2535. The Supreme Court held that the substantial lessening of competition between the favored wholesale distributors' customers (retailers in direct competition with the independent Texaco retailers) and the independent Texaco retailers constituted a violation of § 13(a)(§ 2(a) of the Robinson-Patman Act). *Id.* at 571, 110 S.Ct. 2535. The Supreme Court focused on whether the price discrimination caused injury to competition regardless of whether the favored purchaser was a direct competitor at the same functional level as the disadvantaged purchaser. *Id.* Insofar as *Hasbrouck* addresses competitive consequences at different levels of distribution, it recognizes that anti-competitive effects can occur based on price discrimination between distributors and retailers who both buy from a single manufacturer. *Id.* at 557-59, 110 S.Ct. 2535. *Hasbrouck* does not discuss *Eximco*, nor does it call *Eximco's* holding or analysis into question. Rather, it examines the effects on competition growing out of a differently arranged market.

Similarly, Lycon's reliance on *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir.1994), is misplaced. As in *Hasbrouck*, the plaintiffs

in Caribe BMW were retailers who bought directly from the manufacturer. *Id.* at 748. They challenged BMW's practice of selling cars to a distributor at a discounted price; in turn the distributor resold the cars to other retailers who competed with the plaintiffs for sales to end users and enjoyed a price advantage based upon the discount that was passed along to them by the distributor. *Id.* at 748-49. Far from supporting Lycon's position, *Caribe BMW* serves to highlight the distinction between *Hasbrouck* and the case at bar. Antitrust concerns about competitive effects based on prices paid by buyers who compete for resale at different levels are irrelevant here because Lycon and the end users who buy directly from EVI do not compete for resale at any level.

In sum, Lycon's allegation of price discrimination between itself and end user customers of EVI, who are not retailers and do not resell the product, does not raise the specter of real or potential injury to competition. Lycon has no § 13(a) cause of action because it is not in competition with the allegedly advantaged end users. *See Security Tire & Rubber*, 598 F.2d at 964 (holding that the Robinson-Patman Act targets anti-competitive price discrimination among competing buyers). We therefore find no merit in Lycon's invocation of *Hasbrouck* and *Caribe BMW*.

CONCLUSION

Based on the foregoing, we conclude that the district court did not err in granting summary judgment to EVI based on its holding that, as a matter of law, Lycon could not prove that EVI's discriminatory pricing of gas lift equipment had a prohibited effect on competition.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

Lycon, Inc.	Civil Action No. 98-2125
versus	Judge Tucker L. Melancon
EVI Oil Tools, Inc. and Michael S. Juenke	Magistrate Judge Tynes

JUDGMENT

In accordance with the Memorandum Ruling issued on this date,

IT IS ORDERED that the motion for summary judgment [doc. no. 80] filed by defendants EVI Oil Tools, Inc. and Michael S. Juenke is GRANTED and that plaintiff's federal claims brought pursuant to the Robinson-Patman Act, 15 U.S.C. § 13, are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE.

Thus done and signed this 17th day of April, 2000 at Lafayette, Louisiana.

/s/_____

Tucker L. Melancon
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

Lycon, Inc.	Civil Action No. 98-2125
versus	Judge Tucker L. Melancon
EVI Oil Tools, Inc. and Michael S. Juenke	Magistrate Judge Tynes

MEMORANDUM RULING

Before the Court is a Motion for Summary Judgment filed by defendants EVI Oil Tools, Inc. and Michael Juenke. For the following reasons, the defendants' motion will be granted.

I. Background

The present suit arose out of the failed commercial relationship between plaintiff, Lycon, Inc. ("Lycon"), and defendant, EVI Oil Tools, Inc. ("EVI"). EVI is a manufacturer of artificial gas lift equipment used in the oil and gas industry. On or about April 15, 1996, EVI acquired the assets of Production Specialities, Inc. ("PSI"), a manufacturer of artificial gas lift equipment located in Lafayette, Louisiana. Prior to EVI's purchase of PSI, Ronald Massicot and Greg Maxwell, the principals of Lycon, acted as commissioned sales agents for PSI. Although EVI's purchase of PSI included all proprietary information of PSI, the sale specifically excluded the sales agency agreement Massicot and Maxwell had with PSI.

Allegedly in an effort to determine the future business relationship between EVI, Massicot and Maxwell, Massicot met with Robert Stiles and Kevin Barrett, representatives of EVI. Stiles and Barrett informed Massicot and Maxwell that EVI would not continue to do business with Massicot and Maxwell under the same agreement they had with PSI. Because EVI would not do business with Maxwell and Massicot under the PSI agreement, Massicot made the decision to reactivate Lycon in order to operate as a distributor of gas lift equipment. At the time of the EVI acquisition of PSI, Lycon was an inactive corporation.

For some period of time after April 15, 1996, Maxwell and Massicot, through Lycon, continued to receive gas lift equipment from EVI on consignment and collected commissions from EVI for those sales of consigned goods. During this period, EVI also provided invoicing services to Lycon.

Beginning in October 1997, EVI commenced to undertake direct retail sales through its wholly owned retail outlet stores. This occurred approximately eighteen months after EVI allegedly promised Massicot and Maxwell that EVI intended to be a manufacturer of gas lift equipment only and would market its products through independent wholesale distributors such as Lycon. As a result of EVI entering into the retail sales market, EVI and Lycon began to compete for the same retail customers. Lycon contends that when EVI began to sell directly to retail customers, EVI sold its equipment at prices below which EVI charged Lycon for the same equipment.

Lycon thereafter filed this action, alleging *inter alia*, that EVI's pricing policy was in violation of the Robinson-Patman Act. EVI filed the present motion for

summary judgment seeking dismissal of all of Lycon's claims, both state and federal.[1]

II. Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings, depositions and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994) (en banc). When a party seeking summary judgment bears that burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if such evidence were uncontroverted at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence supporting the non-moving party's claim. *Celotex Corp.*, 477 U.S. at 324.

Once the movant produces such evidence, the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Id.* The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242-248-49 (1986); *Little*, 37 F.3d at 1075. If no issue of

[1] Lycon's state law claims include alleged violations of the Louisiana Price Discrimination Act, La. R.S. 51:331 *et seq.*, Louisiana Unfair Trade Practices Act, La. R.S. 51:1401 *et seq.*, Louisiana Uniform Trade Secrets Act, La. R.S. 1431 *et seq.*, tortious interference with contract, breach of implied contract and damages for detrimental reliance. Lycon also asserted a claim under the Louisiana Unfair Sales Act, La. R.S. 51:421 *et seq.*, but concedes such claim must be dismissed as EVI is exempt from liability as a manufacturer pursuant to La. R.S. 51:426(9).

fact is presented and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. Fed. R. Civ.P. 56(c); *Celotex Corp.*, 477 U.S. at 322. Before it can find that there are no genuine issues of material fact, however, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Id.*

III. Analysis

A. Robinson-Patman Act Claims

Lycon contends that EVI's sales to Lycon's retail customers at a lower price than EVI's sales to it is a form of prices discrimination prohibited by the Robinson-Patman Act. EVI maintains that is pricing policy is not prohibited and that Lycon's Robinson-Patman Act claim should be dismissed.

Section 2 of the Robinson-Patman Act provides that "[i]t shall be unlawful for any person engaged in commerce...to discriminate in price between different purchasers of commodities of like grade and quality...where the effect of such discrimination may be...to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them..." 15 U.S.C. § 13(a). "The basic purpose of Section 2(a) of the Act was to insure that purchasers from a single seller would not be injured by the seller's discriminatory pricing policies." *Hiram Walker, Inc. v. A&S Tropical, Inc.* 407 F.2d 4,7 (5th Cir. 1969).

"Injury under section 2(a) of the Robinson-Patman Act will be one of two basic types: primary line or secondary line. Primary-line injury, which occurs at the level of direct competition, customarily results when a seller uses predatory pricing policies to enhance his market position over

competitors, thereby diminishing the vigor of competition and increasing market concentration." *Eximco v. Trane Co.*, 737 F.2d 505, 515 (5th Cir. 1984). In contrast, secondary line cases involve "favored purchasers." "Second-line injury customarily results when a large purchaser uses its vast purchasing power to obtain low prices from the manufacturers or distributors whose products it stocks, thereby enabling it to undersell competitors." *Id.*

The case *sub judice* is a secondary-line injury case. EVI through its retail outlet stores made sales to retail customers, the favored purchasers, at lower prices than EVI sold to Lycon, the disfavored purchaser. Accordingly, a "plaintiff alleging a secondary-line injury must prove that a seller made a sale to two different buyers at the same functional level of competition, charging different prices to each." *Eximco*, 737 F.2d at 515. Lycon does not challenge the transfers from EVI to its retail outlet stores.[2] Rather, Lycon complains that the sales from EVI retail outlet stores are discriminatorily lower than EVI sales directly to Lycon. Nevertheless, Lycon's claim that EVI makes sales to retail customers below wholesale is not actionable because the transactions of which a Robinson-Patman plaintiff complains must either be with a favored purchaser at the same level of competition as the plaintiff or affect competition between parties at the same level of competition. *Id.*

The Fifth Circuit in *Eximco* recognized that in a secondaryline injury case factually similar to the one at bar, a literal interpretation of § 2 of the Act would require a finding in favor of Lycon. *Id.* In *Eximco*, the plaintiff, a wholesale distributor of the defendant's product, challenged the

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[2] *See Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979) (transfer of inventory from a manufacturer to a wholly owned subsidiary corporation not a "purchase" for purposes of Section 2(a)).

defendant's practice of selling directly to retail customers via local franchisees who functioned as sales agents for the defendant. The defendant "engaged in commerce, sold to 'different purchasers' like commodities at different prices, and thereby injured [the plaintiffs] ability to compete with [the defendant], a 'person' who granted the benefit of such discrimination." *Id.* at 514. The court held that although a literal reading of the statute would require a finding in the plaintiff's favor, such actions were not necessarily violative of the Act. The court reasoned that the "somewhat paradoxical intent behind the Robinson-Patman Act ...is to promote competition by protecting *competitors."* *Id.* (emphasis added). The court rejected the plaintiff's argument that the defendant's "sales" to its local franchisee was a "purchase" so that the defendant's similar sales to plaintiff were at the same level of competition. Citing an earlier Fifth Circuit case, *Security Tire & Rubber Co. v. Gates Rubber Co.,* 598 F.2d 962 (5th Cir. 1979), the court cautioned that it must look behind the manufacturer's distribution structure to ascertain the identity of the true competitors.[3]

Lycon argues the Fifth Circuit's opinion in *Eximco* is not controlling because the plaintiff in *Eximco* did not challenge the defendant's sale to retail customers presumably because the price the plaintiffpaid the defendant was not factually less than the price the defendant directly charged the retail customers. However, the Fifth Circuit expressly

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[3] *Security Tire & Rubber Co.*, involved a situation where the plaintiff was challenging the sales made to a manufacturer's company-owned outlet as being lower than that sales made to the plaintiff. The Fifth Circuit recognized that the competition was between the manufacturer and its subsidiary outlet as a single economic unit on the one hand, and plaintiff, on the other hand. 598 F2d at 967. Finding no violation of the Act, the court held that internal transfers between two levels in the distribution chain were of no real competitive consequence to the alleged disfavored buyer. *Id.*

acknowledged the district court's finding that the prices quoted by the defendant to the retail customers directly was less than the actual cost of the product to the plaintiff. *Eximco*, 737 at 510, n. 1. If not explicitly, the court at least implicitly recognized that the defendant's direct sales to retail customers were not sales made at the same level of competition as the sales made to the plaintiff.

Factually, EVI's sales to retail customers at a lower price than EVI's sales to Lycon is indistinguishable from the defendant's sales in *Eximco*. Chevron, Marathon and the other "Lycon retail customers" are not in competition with Lycon. Instead, these purchasers are customers of Lycon.[4] EVI, through its retail outlet stores, is not at the same functional level of competition with Lycon. Quite simply, the EVI sales to Lycon and the EVI sales to retail customers are not the same. The former sales are made at a wholesale level; the latter sales are made at a retail level. *See Dart Industries, Inc. v. Plunkett Co. of Okla., Inc., 704* F.2d 496, 499 (10th Cir.1983) (granting summary judgment on 15 U.S.C. § 13(a) claim in favor of manufacturer because distributor of manufacturer's products and manufacturer's direct retail accounts are not in competition). The Supreme Court recognized the principle of functional levels of competition explicitly in its interpretation of § 13(d) of the Act, a provision similar to § 13(a), holding that it "reaches only discrimination between customers competing for resales at the same functional level and, therefore, does not mandate proportional equality between [a retailer] and the two wholesalers." *FTC v. Meyer*, 390 U.S. 341, 349 (1968).

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[4] *See FTC v. Morton Salt*, 334 U.S. 37, 43 (1948) (there may be a Robinson-Patman Act Violation even if the favored and disfavored buyers do not complete, so long as the customers of the favored buyer complete with the disfavored buyer or its customers).

Despite the requirement of functional equality expressed by the Supreme Court in *Meyer* and the Fifth Circuit in *Eximco*, Lycon argues that the Supreme Court's decision in *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990), dispenses with any such requirement. Lycon contends that "[a]fter *Hasbrouck*, nonstatutory rubric such as the 'functional level' requirement found in *Eximco* has no continuing vitality." *Plaintiff's Opposition*, p. 11. Lycon relies on the Supreme Court's broad statement in *Hasbrouck* that "a price discrimination within the meaning of § 2(a) is merely a price difference." *Hasbrouck*, 496 U.S. at 559. In *Hasbrouck*, the plaintiffs, direct retail sellers of Texaco products, alleged price discrimination regarding Texaco's sales to two wholesale distributers. Texaco argued, *inter alia*, that its pricing policies did not injure competition because the favored purchasers were at the wholesale level of competition where the plaintiffs were at the retail level. Rejecting Texaco's argument, the Supreme Court held that Texaco's pricing policy was in violation of the Act. *Id.* In reaching this conclusion, the Supreme Court focused on the effect the price discrimination had on the level of competition between the plaintiffs on the one hand and the retailers who purchased from the favored wholesalers on the other. *Hasbrouck*, 496 U.S. at 561. Even though the favored purchasers were not at the same direct functional level of competition as the plaintiffs, the Supreme Court found the substantial lessening of competition between the wholesaler's customers, who were retailers in direct competition with the plaintiffs, and the plaintiffs violated the Act.

As the Court appreciates the teachings of *Hasbrouck*, the functional equality requirement is still viable and is directly related to Lycon's burden of proving that EVI's alleged price discrimination had a prohibited effect on competition between parties at the same level of competition.

Although not as explicit as the functional equality requirement recognized in *Eximco*, "the competitive injury competent of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers." *Falls City Industries*, 460 U.S. at 436. Thus, functional equality can be analyzed at two levels: direct competition and indirect competition. At the direct level, functional equality is satisfied if the favored purchaser and disfavored purchaser compete at the same distribution level. *See Meyer*, 390 U.S. at 349. In contrast, indirect functional equality occurs where the supplier treats purchasers at different levels of the distribution chain unequally, with the net effect being a lessening of competition at the end of the distribution chain. *See Hasbrouck*, 496 U.S. at 571; *see also Meyer*, 390 U.S. at 354 ("Whether suppliers deal directly with disfavored competitors or not, they can ...afford a direct buyer the kind of competitive advantage which [the Act] was intended to eliminate."). Regardless of how the level of competition is labeled, if the ultimate result of discriminatory price treatment is to affect the competition between parties at the same level, the disfavored purchaser has satisfied one of the essential elements of its claim.

Here, Lycon cannot prove that EVI's alleged price discrimination had a prohibited effect on competition on either a direct or indirect level of functional equality. Because the EVI retail outlets and Lycon function on a direct level of competition and Lycon admits that it is not challenging the EVI transfers to its retail outlets, Lycon concedes that there is no price discrimination at the direct level of competition. Likewise, Lycon cannot prove price discrimination at the indirect level of competition. EVI, through its retail stores, sells directly to the ultimate consumer. Since Lycon sells to the same consumers as EVI, there is no injury to competition

between customers as prohibited by the Act. *See Caribe BMWv. Bayerische Motoren Werke*, 19 F.3d 745, 748 (1st Cir. 1994)(there must be two sales at different prices to different customers who are in competition with each other).[5]

There can be no genuine issue as to any material fact where the nonmoving party completely fails to prove an essential element of his claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)("The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof."). As Lycon has failed to offer evidence that it will be able to prove an essential element of its claim at trial, the Court will grant EVI's motion for summary judgment and will dismiss Lycon's RobinsonPatman Act claims.

B. State Law Claims

Although 28 U.S.C. § 1367 confers supplemental jurisdiction over Lycon's state law claims, the assertion of supplemental jurisdiction may be declined if all claims over which the Court has original jurisdiction are dismissed. 28 U.S.C. § 1367(3). "When a court dismisses all federal claims before trial, the general rule is to dismiss any pendent claims.

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[5] Lycon cites *Caribe BMW* to support its position that this Court should abandon the "functional level" analysis. However, Lycon fails to recognize that the prohibited price discrimination in *Caribe BMW* was between the plaintiff, a retail seller, and other retail sellers who purchased at a favored price from the defendant manufacturer's wholly owned distributor. 19 F.3d at 749. Unlike the customers at issue in the present case, the plaintiff and the favored retail sellers in *Caribe BMW* were at the same functional level of competition. As such, the First Circuit was able to find prohibited price discrimination because the manufacturer's pricing policy affected competition between entities at the same level of competition.

However, the dismissal of the pendent claims should expressly be without prejudice so that the plaintiff may refile his claims in the appropriate state court." *Bass v. Parkwood Hosp.*, 180 F.3d 234, 246 (5th Cir. 1999). "The Supreme Court in *United Mire Workers of America v. Gibbs,* emphasized that '[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surerfooted reading of the applicable law." *Noble v. White,* 996 F.2d 797,799 (5th Cir. 1993)(citation omitted). Because Lycon's federal claim will be dismissed by this ruling, the Court will not have original jurisdiction over Lycon's remaining state law claims.

Accordingly, the Court will dismiss Lycon's state law claims without prejudice.

V. Conclusion

For the foregoing reasons, the Court will grant defendants' motion for summary judgment and dismiss plaintiff's federal claim with prejudice. Additionally, the Court will dismiss plaintiff's state law claims without prejudice. /s/ TLM